87-1266

Supreme Court, U.S.
FILED
JAN 11 1988
JOSEPH F. SPANIOL, JR.
CLERK

No. _____

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1988

JAMES R. BELL,

Appellant,

V.

MARGARET ANN BELL,

Appellee.

On Appeal from the
Supreme Court of the State of California

JURISDICTIONAL STATEMENT

JAMES R. BELL
25942 Carmel Knolls Drive
Carmel, California 93923
(408) 625-9980 Appellant in Pro Per

DEWAR, ROMIG AND ROCKWOOD
TERRY G. ROCKWOOD
Attorney at Law
P.O. Box 1027
Monterey, California 93940
(408) 373-4463 Attorney for Appellee

January 7, 1988

QUESTIONS PRESENTED

1) Now comes James R. Bell with two simple questions regarding a Federal Statute. The Appellant has never contested the States' rights to award a former spouse a percentage of a military pension as community property.

The Department of Defense Authorization Act of 1983, Section 1006(b), states:

> "Subsection (d) of section 1408 of title 10, United States Code, as added by section 1002(a), shall apply only with respect to payments of retired or retainer pay for periods beginning on or after the effective date of this title, but without regard to the date of any court order. However, in the case of a court order that became final before June 26, 1981, payments under such subsection may only be made in accordance with such order as in effect on such date and without regard to any subsequent modifications."

The Appellant's divorce decree awarded Appellee a percentage of Appellant's Federal pension; i.e. "221/576 of the total monthly pension RECEIVED by Respondent from the Federal Government". The Appellant's cause for action is stated briefly and concisely in

his Grounds For Invoking Jurisdiction and needs no further elaboration. Just the answer to Appellant's first question is sought: does amount received from a Federal pension mean "Net or Gross" i.e. before or after Federal deductions?

2) Does this disregard of a Federal Statute by one state court set a precedence for all other fifty states to follow? A one state interpretation of a Federal created benefit, denying equal protection of the law for military retired persons, is not consistent with the mearing of the 14th Amendment (Ratified July 9, 1868) to THE CONSTITUTION OF THE UNITED STATES, which reads as follows:

> "Section 1, All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws." (Emphasis added.)

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GROUNDS FOR INVOKING JURISDICTION

Nature of Proceeding

This is a case determining the meaning of a Federal Statute wherein the Appellant, James R. Bell, has been denied a direct answer by all courts in California as to the meaning of a judgment entered April 27, 1973. The Trial Court awarded Defendant "221/576 of the total monthly pension received by Respondent from the Federal Government". After Plaintiff requested an interpretation of the meaning of the word received the Trial Court ruled in a Decision (June 5, 1985) "the request to review the Judgment of Dissolution is untimely and barred by res judicata". The Court of Appeal decision in subject case, filed August 13, 1987 (App-1), also failed to address the question at issue. Moreover, a Petition for Rehearing to the Court of Appeal, requesting a specific Decision on the question at issue, was denied September 9, 1987.

In the early 1970's the California Trial Courts entered a few Judgments in Interlocutory Divorce Decisions, where a community property split of a military pension was based on the total amount received. From the mid 1970's, onward, most Trial Court Judgments on a division of community property interest in a military retirees' pension was covered in one simple sentence; "Beginning (on a specific date) the retiree is to pay former spouse the sum of one-half the number of years married divided by years of military service of his gross military retirement", or a similar statement specifically stating "gross".

Date of Judgment to be Reviewed

A Petition for Rehearing was filed August 26, 1987 in the Court of Appeal of the State of California in the SIXTH APPELLATE DISTRICT and denied, September 9, 1987. (App-15) The Supreme Court of California denied review of the judgment of the California Court of Appeals, filed November 18, 1987 (App-16).

Date of Notice of Appeal

A copy of Notice of Appeal in the United States Supreme Court was filed in the California Court of Appeals on December 17, 1987 (App-17).

STATEMENT OF THE CASE

Appellant is a retired Naval Officer, with twenty-four years of honorable service and has never argued the fact that the California Courts have no Jurisdiction to award a former spouse a split of a Military retiree's Federal pension. The Appellant believes however, that the California Courts should have exercised their plenary Jurisdiction and ruled on his simple questions. The Appellant now asks the highest court of this land for a decision.

CONCLUSION

The Appellant believes an interpretation of the meaning of the word "received" in an Interlocutory Divorce Decision is a question of Federal law that has never been decided by the Courts. The Appellant is not arguing that

the California Courts do not now have the power, in view of the Federal Uniformed Services Former Spouses' Protective Act (FUSFSPA), 10 U.S.C. 1408, to award a former spouse an interest in the "gross" amount of a military retiree's pension, where divorce decree failed to dispose of said pension. The Appellant's Interlocutory Judgment of Divorce, however, was decided long before FUSFSPA and specifically stated that the computation of the award to the spouse was to be based on the amount received by the retiree, not "gross" pay. It is the meaning of the words "amount received" upon which the California Courts failed to make a specific ruling, that the U.S. Supreme Court is here asked to decide. Appellant contends that the words in question speak for themselves and mean the net amount received is after Federal deductions.

The importance of a determination of the meaning of the Trial Court's use of the words "amount received" and the gross amount of pension received by the Appellant will be readily apparent to this Court as payments under the Trial Court order has no termination date and imposes a permanent burden on the Appellant.

IN THE COURT OF APPEAL

OF THE STATE OF CALIFORNIA

SIXTH APPELLATE DISTRICT

In re the Marriage of MARGARET

and JAMES BELL

MARGARET BELL,

Respondent,

vs.

JAMES BELL,

Appellant.

FILED
AUG 13, 1987
by Court of Appeal

No. H000829

(Monterey County
Super.Ct.No. DR3739)

The marriage of James R. Bell and Margaret Ann Bell ended on June 27, 1973 with the entry of a final judgment of dissolution in Monterey County Superior Court. The quarrels between the former spouses, however, have continued throughout the years. In the present proceeding, James has filed a Notice of Appeal in propria persona, attempting to show that, under the following circumstances, he was not

given a fair hearing on various controversies:

1. Margaret and her attorney were pursuing James to receive allegedly overdue spousal support payments and attorney's fees. James wrote a letter to the State Bar attacking the attorney, and sent a copy to the superior court judge hearing the matter. Included in the forwarding letter to the judge was James' comment that he had not sent a copy of the document to the attorney. The judge responded that it was highly inappropriate to send him, ex parte, materials derogatory of the other party's attorney since that action taints the factfinding process and violates the California Rules of Court. "If it happens again," wrote the judge (with a copy to counsel), "I will take appropriate action."

To, James, this statement by the judge unconstitutionally abridged his liberty of speech or press.

2. Margaret sought to enforce the division of James' military pension benefits as

originally provided in the 1973 dissolution. James contended that he was entitled to a satisfaction of judgment for having paid more than the amounts due under that decree. At a hearing on November 7, 1984, Margaret and her attorney were present. James was present during negotiations but voluntarily absented himself (due to illness) when the case was called. He was represented by his then-attorney, who informed the judge that the stipulation had been entered into before James left the courthouse and that James had been told all of the terms. Through their attorneys, the parties entered into a stipulation which was read into the record. Essentially, except for specifically excluding disability benefits, the agreement used the same formula which was used in the 1973 decree to fix the percentage of James' military pension to which Margaret wa entitled, and referred the paperwork to a special master for his calculations.

The terms of the stipulation were approved as to form and content by James' attorney on or about January 25, 1985 and filed as an Order on Stipulation on January 28, 1985.

The apparent cooperation between the parties, however, proved to be illusory. On March 15, 1985, James filed a written statement, in propria persona, in which he said that his attorney had agreed to the stipulated terms without James' approval. In seeking relief, James also requested a trial by jury and a different judge. The request for disqualification was denied by another judge and the matter referred to the judge who had made the Order on Stipulation.

By an interim order, the court ruled that James had waived his attorney-client privilege with respect to the facts and circumstances under which the Order of Stipulation had been made. James' attorney therefore filed a declaration which set forth the manner in which the stipulation was worked out.

According to the attorney's declaration, the parties had extensive settlement discussions outside the courtroom on November 7, 1984, the date of the hearing. The parties negotiated a gross pension-net pension-disability payment exclusion in exchange for a waiver of attorneys' fees. Noting that James did not want to reappear in court because of illness, the attorney believed that James fully understood the terms of the stipulation before it was announced in open court.

When James later spoke to his attorney about the stipulation, refusing to comply with it, his attorney initially suggested that James retain other counsel. But after further discussions, James authorized his attorney to sign the stipulation. James also told his attorney that he had delivered the documents called for by the stipulation to the designated accountant. Following this authorization by James, his attorney forwarded the signed stipulation to Margaret's attorney as the basis for the Order on Stipulation

filed January 28, 1985.

As part of its evaluation of the settlement procedures to determine whether James' requests for setting it aside were vaiid, the court also had before it a declaration by Margaret's attorney, dated May 14, 1985, referring to the strenuous efforts on everyone's part to work out a stipulation for the November 7, 1984 settlement.

In a minute order dated June 5, 1985, the court addressed the issues raised by James and decided them as follows:

(a) Despite James' request, he had no right to a jury trial in this marital dispute.

(b) The evidence overwhelmingly established that James' attorney had actual authority to enter into the disputed stipulation. The written order was consistent with the stipulation.

(c) James' attempt to have the court review the terms of the original dissolution judgment was untimely and barred by res judicata since the judgment was final; James

had actual knowledge of its terms, and James had been represented by counsel when the judgment was rendered.

(d) For defending against James' motion and for trying to enforce the previous order, Margaret's attorney was entitled to fees of $1,582.50.

The court also noted that James' attempt to disqualify a judge under Code of Civil Procedure section 170.6 was both untimely (as ruled on by another judge) and was improper because James had previously challenged a different judge under the same statute.

Dissatisfied with these results, James is now seeking a "fair hearing" by appealing from the orders of June 5, 1985. Pursuant to California Rules of Court, rule 53, we have liberally construed the rules to secure the just and speedy determination of this appeal. We find no error in the proceedings below. Judgment affirmed.

ANALYSIS

1. Ex Parte Communications With A Judge

The judge's statement to James, prohibiting ex parte communications, is not a violation of James' constitutional rights. (See Rules Prof. Conduct, rule 7-108(B) [prohibiting a member of the state bar from writing to a judge about the merits of a pending matter unless he furnishes a copy of the writing to opposing counsel]; Heavey v. State Bar (1976) 17 Cal. 3d 553, 559 [the rule prohibiting an attorney from communicating with a judge without opposing counsel's knowledge is a "rule of fairness meant to insure that all interested sides will be heard on an issue"]; Doran v. Dreyer (1956) 143 Cal.App.2d 289, 290 [a litigant has the right to act as his own attorney but, in so doing, should be restricted to the sames rules of evidence and procedure as is required of those qualified to practice law before the courts].)

2. Court Trial In Dissolution Cases

If James had been entitled to a jury, the wrongful denial of a jury would have constituted reversible error. (See Turlock Golf etc. Club v. Superior Court (1966) 240 Cal.App.2d 693, 695.) But no impropriety occurred here since he had no such right. "It is axiomatic that there is no right to a jury trial in a divorce action." (Porter v. Superior Court (1977) 73 Cal.App.3d 793, 798.)

Under Civil Code section 4351, the superior court has jurisdiction to make appropriate orders about support for either party, for settlement of their property rights, and for an award of attorneys' fees and costs. The court may properly determine title to property, whether based on legal or equitable claims, even though as a general rule the court has no jurisdiction to deal with the sppouses' separate property. If the parties to a dissolution proceedings put in issue the

character of the property they hold, whether separate or community, the court is vested with jurisdiction to determine that question as fully as if the title were put in issue in a direct action brought for that purpose. (Porter, supra, 73 Cal.App.3d at p. 804.) Here, the financial dispute was over the proper fractional interest which Margaret had in James' military pension benefits. The issue was originally decided by the court which entertained the dissolution action in 1973 and was more recently examined by the court whose order James is now attacking. In neither case was James entitled to a jury.

3. The Attorney's Authority To Enter Into A Stipulation

The court found that James' attorney had his Client's authority to enter into the stipulation for payments. Despite James' statements to the contrary, all doubts about confilcting evidence must be resolved in favor of the trial court's decision, which will be

overturned only if there is no substantial evidence to support the determination. (Tyronev. Kelley (1973) 9 Cal.3d 1, 7.) Here, the substantial evidence supports the court's ruling.

Based on the authority which James had conferred on him both before and after the stipulation was entered into, James' attorney properly could stipulate to a fractional division of James' military pension benefits in exchange for a waiver of attorney's fee claims. (See In re Marriage of Carter (1971) 19 Cal.App.3d 479, 488; see also Casas v. Thompson (1986) 42 Cal.3d 131 [a state court may treat a vested military pension as community property, and may make an award based on gross retirement pay rather than "disposable" pay.])

4. The Request To Clarify The Original Judgment of Dissolution

About 12 years after the marriage of James and Margaret was dissolved, James sought

clarification of the Judgment, essentially by attacking its provisions. The court properly ruled that the request for relief was the equivalent of a motion for a new trial under Code of Civil Procedure section 659 to obtain the benefits available under section 662, i.e., a modification of the Judgment and a reopening of the case for futher proceedings. The deadlines for the motion have passed years ago. (Code Civ. Proc., section 659.)

5. The Award Of Attorney's Fees

Under Civil Code sections 4351 and 4370 et seq., the court had power to award Margaret attorney's fes and costs from James. There was no error in that award.[1]

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[1]/ James filed his notice of appeal on June 24, 1985. As of that date, the only attorney's fees which were at issue was the sum of $1,582.50 which had been awarded to Margaret primarily for her defense against James' motion for miscellaneous relief. That amount is therefore the only amount which we have considered on this appeal. The court below also ordered additional fees for events which occured after the date of the notice of appeal. Other than observing that such awards are within the court's power to make, we do not address their validity.

6. The Attempt To Disqualify The Judge

James sought, under Code of Civil Procedure section 170.6, to disqualify the judge who previously heard parts of this dispute on the merits. That motion was denied as untimely by another judge. Not only was this ruling proper on the timeliness issue (see Miller v. Miller (1970) 11 Cal.App.3d 197, 202), but James had previously availed himself of his opportunity to peremptorily challange a different Judge. The statute gives him only one such chance. (Code Civ. Proc., section 170.6 subd. (3).)

MARGARET'S REQUEST FOR SANCTIONS

Margaret has requested sanctions under Code of Civil Procedure section 907 on the ground that James' appeal was frivolous or taken solely for delay. Considering the uncertain status of military pension rights in community property states (See Casas v. Thompson, supra. 42 Cal.3d 131), we cannot say that James appealed only for improper purposes. We therefore award no such damages.

(In re Marriage of Flaherty (1982) 31 Cal.3d 637.) We specifically note, however, that, after an appeal has been concluded, the superior court has power under Civil Code section 4370 to award costs and attorneys' fees.

Judgment affirmed.

Capaccioli, J.

WE CONCUR:

Brauer, Acting P.J.

Evans, J. *

In re Marriage of BELL

No. H000829

* Assigned by the Chairperson of the Judicial Council.

COURT OF APPEAL OF THE STATE OF CALIFORNIA

IN AND FOR THE

SIXTH APPELLATE DISTRICT

MARRIAGE OF BELL

MARGARET ANN BELL, Respondent,	)	No. H000829
vs.	)	SC No. DR3739
JAMES R. BELL, Appellant.	)	

BY THE COURT

The petition for rehearing is denied.

DATE: Sep 9 - 1987

S/AGLIANO, P.J.

ORDER DENYING REVIEW

AFTER JUDGMENT BY THE COURT OF APPEAL

6th District, No. H000829

S002700

IN THE SUPREME COURT

OF THE STATE OF CALIFORNIA

IN BANK

IN RE MARRIAGE OF BELL

BELL, Respondent,
v.
BELL, Appellant.

Appellant's petition for review DENIED

DATE: Nov. 18, 1987

LUCAS
Chief Justice

IN THE SUPREME COURT OF

THE STATE OF CALIFORNIA

DECEMBER 17, 1987

JAMES R. BELL, Appellant,	)	
v.	)	No. S002700
MARGARET ANN BELL, Appellee.	)	

NOTICE OF APPEAL TO THE SUPREME COURT

OF THE UNITED STATES

Notice is hereby given that James R. Bell, the appellant above named, hereby appeals to the Supreme Court of the United States from the final judgment of the Supreme Court of the State of California, denying Review of Judgment by the Court of Appeal, Sixth Appellate Dictrict, No. H000829, entered in this action on November 18, 1987.

This appeal is taken pursuant to 28 U.S.C. Section 1257 (1).

S/ James R. Bell
Appearing in Proper Person

AFFIDAVIT OF JAMES R. BELL

I hereby certify that the Notice of Appeal was mailed to all State of California Courts and Appellee's attorney on December 17, 1987. The bar number of interested parties is not known by the Appellant.

I served the NOTICE OF APPEAL TO THE SUPREME COURT OF THE UNITED STATES on interested parties in said cause, addressed as follows:

Clerk of the Supreme Court of the State of California.

Clerk of the Appellate Court, Sixth Appellate District, State of California.

Clerk of the Superior Court, Monterey County, State of California.

Terry G. Rockwood,
P.O. Box 1027
Monterey, Ca. 93940
Attorney for Appellee.

Respectfully submitted

s/ James R. Bell
In Proper Person
Appellant